Aw Ngoh Leang v Inspector General of Police & Ors

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-238-90
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM SCJ AND LC VOHRAH J
8 OCTOBER 1992

Constitutional Law *— Preventive detention — Application for habeas corpus — Failure to give a detainee the correct number of prescribed forms for making representations — Whether failure resulted in prejudice and injustice — Public Order and Prevention of Crime (Procedure) Rules 1972 r 3(2)*

The appellant was detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. When he was detained, only one copy of the prescribed form for making representations against the detention was given to him, contrary to r 3 of the Public Order and Prevention of Crime (Procedure) Rules 1972 ('the Rules'). An application for habeas corpus was dismissed in the High Court and the appellant appealed.

Held, allowing the appeal:

(1) The provisions of r 3(2) of the Rules are mandatory as they concern the right of a person detained without trial to seek his own release by a procedure for the making of representations requiring the filling-up of a minimum of two forms and of one more if the detainee intends to be represented by an advocate before the Advisory Board. Any disobedience of the mandatory requirements for the protection of this right would vitiate an order of detention made even if no real prejudice has ensued to the detainee.

(2) The maxim de minimis non curat lex (the law does not concern itself with trifles) relied on by the learned trial judge can have no application in such a case as a breach of a mandatory requirement can never be a trifling matter when it involves the civil liberty of an individual.

[Bahasa Malaysia summary

Perayu telah ditahan di bawah Ordinan Darurat (Ketenteraman Awam dan Mencegah Penayah) 1969. Apabila beliau ditahan, hanya satu salinan borang yang ditetapkan untuk membuat bantahan terhadap penahanan itu telah diberikan kepadanya, bertentangan dengan k 3 Kaedah-Kaedah Ketenteraman Awam dan Pencegahan Jenayah (Acara) 1972 ('Kaedah itu'). Permohonan untuk habeas corpus telah ditolak di dalam Mahkamah Tinggi dan perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Peruntukan k 3(2) Kaedah itu adalah mandatori kerana ia melibatkan hak seseorang yang ditahan tanpa pembicaraan untuk

meminta pelepasannya melalui suatu prosedur untuk membuat bantahan yang memerlukan pengisian sekurang-kurangnya dua borang dan satu lagi jika orang yang ditahan itu bertujuan supaya beliau diwakili oleh seorang peguambela di hadapan Lembaga Penasihat. Sebarang keingkaran keperluan mandatori untuk perlindungan hak itu akan mentaksahkan suatu perintah penahanan yang telah dibuat walaupun orang yang ditahan itu tidak dimudaratkan.

(2) Maxim de minimis non curat lex (undang-undang tidak mengira perkara yang kecil) yang digunakan oleh hakim yang arif tidak boleh terpakai di dalam kes seperti ini kerana perlanggaran keperluan mandatori tidak boleh dianggap sebagai perkara yang kecil apabila ia melibatkan kebebasan sivil seseorang.]

Case referred to

1 *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28 (folld)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 5(3)

Public Order and Prevention of Crime (Procedure) Rules 1972 r 3(2)

Appeal from: Criminal Application No 44/87/89 (High Court, Muar)

Karpal Singh (*Karpal Singh & Co*) for the appellant.

Suriyadi bin Halim Omar (Senior Federal Counsel) for the respondents.

LC Vohrah J: This was an appeal against the decision of the High Court at Muar dismissing the appellant's application for habeas corpus. That application was heard by the learned judicial commissioner together with 31 other applications, all having the same factual basis except for the dates of the detention orders that were made. The common and sole question for determination in the proceedings before the learned judicial commissioner was whether the provisions of r 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 ('the Rules') made pursuant to s 5(3) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 had been breached and warranted the appellant's release from detention.

To put things in proper context, the relevant provisions of the Rules are set out as follows:

(1) When any person is brought to a place of detention in pursuance of a detention order it shall be the duty of the Officer in Charge to inform him, as soon as practicable after his arrival, of his right to make representations against the detention order within the time and in the manner hereinafter provided.

(2) It shall be the duty of the Officer in Charge, when informing any detained person of his right to make representations, to provide him with two copies (or, if the detained person states that he intends to engage an advocate to represent him, three copies) of Form I in the Schedule.

(3) The detained person shall, if he desires to make representations, complete one copy of the form in time to enable the Officer in Charge to forward it to the Secretary not more than fourteen days after the arrival of the detained person at the place of detention, and it shall be the duty of the Officer in Charge to forward the form to the Secretary before the expiry of that period.

It was not disputed that only one copy of Form I was given to the appellant and his complaint before the learned judicial commissioner was that there was non-compliance with the requirements of r 3(2) which 'prejudiced [him] and resulted in injustice'. The learned judicial commissioner was of the view that this was an apt situation to which the maxim de minimis non curat lex (the law does not concern itself with trifles) should be made to apply in respect of the non-compliance because the appellant's appeal before the Advisory Board had been heard and disposed of and he took the view that it was futile to argue well after the event that only one form had been furnished to the appellant. He accordingly dismissed the application.

In the appeal before us, the appellant challenged the decision of the learned judicial commissioner on two grounds, namely (1) that the learned judicial commissioner had erred in law in failing to decide that the detention was bad in law because the respondents had infringed the appellant's rights when they provided only one copy of Form I to him; and (2) that the learned judicial commissioner ought to have held that the respondents' failure to serve a *signed* copy of the detention order made the detention null and void. We allowed the appeal on the first ground and did not consider it necessary in the circumstances to deal with the second ground. We now give our reasons for allowing the appeal in the light of similar appeals pending before this court.

Before us, counsel for the appellant cited the case of *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*[1] which involved a detention under the same provisions of the law and in similar circumstances whereunder a police officer had provided the detainee only one copy of Form I. In a well-considered decision of the High Court on the very point, Edgar Joseph Jr J (as he then was), in allowing the detainee's application for habeas corpus, had this to say at pp 29–30:

> There had been a consistent current of judicial opinion in our courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with. (See for example, *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171, *Rajoo s/o Ramasamy v Inspector General of Police & Ors* [1990] 2 MLJ 87 and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297, in all of which the detainee succeeded on purely procedural or technical grounds.)
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> ...
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> In my view, in considering the question posed by this application a distinction has to be made between procedural requirements which are of direct relevance to the detention order and those which are not. To put it another way, a distinction must be drawn between procedural requirements which are 'directory' only and those which are 'mandatory'. The principle involved is simple enought to state but its application to specific cases is often not free from difficulty as has

been aptly put by SA de Smith in his book, *Judical Review* at p 142: 'The law relating to the effect of failure to comply with procedural requirements resembles an inextricable tangle of loose ends.' A

And at p 31:

> ... Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is, which, judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based common sense lines. ...
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> It is manifestly clear that the requirements of r 3 for the delivery to a detainee of the requisite number of copies of Form 1 wherein appear the grounds for his detention are not just a concession but a *right* designed *to enable and not just to assist* him in making representations to the Advisory Board which has the power to recommend his release to the Yang di Pertuan Agong. If he does not intend to engage counsel then he *shall* be provided with *two* copies of Form 1 — one to be sent to the Secretary of the Advisory Board and the other to be retained by him for his reference, so that if and when he appears before the Advisory Board he will be in a position to refer to it, and if he so wishes, to make oral supplementation. Without his own copy, therefore, he might well be at a disadvantage in proceedings before the Advisory Board.
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> If, on the other hand, a detainee intends engaging an advocate, it goes without saying that the advocate too must have a copy of Form 1 to enable him to prepare a detainee's case; hence the requirement by the bracketed words in r 3(2) that a detainee *shall* be provided with three copies of Form 1 should he intend to engage an advocate to represent him. [Emphasis provided.]

B C D E

We are of the view that the above observations of the learned judge reflect the correct interpretation of the mandatory nature of the relevant provisions as they concern the right of a person detained without trial to seek his own release by a procedure for the making of representations requiring the filling-up of a minimum of two forms and of one more if the detainee intends to be represented before the Advisory Board. Any disobedience of the mandatory requirements for the protection of this right would vitiate any order of detention made even if no real prejudice has ensued to the detainee. The maxim de minimis non curat lex can have no application in such a case as a breach of a mandatory requirement can never be a trifling matter when it involves the civil liberty of an individual. F G

Appeal allowed.

Reported by Prof Ahmad Ibrahim H

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